

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1088 OF 2004.**

Isaq Yakub Shikalgar
& Others

..Appellants

versus

Bapu Sahebji Shikalgar (Lohar)
& Others

..Respondents

Mr.Umesh Mankapure for the Appellants

Mr.Dilip Bodake for the Respondents

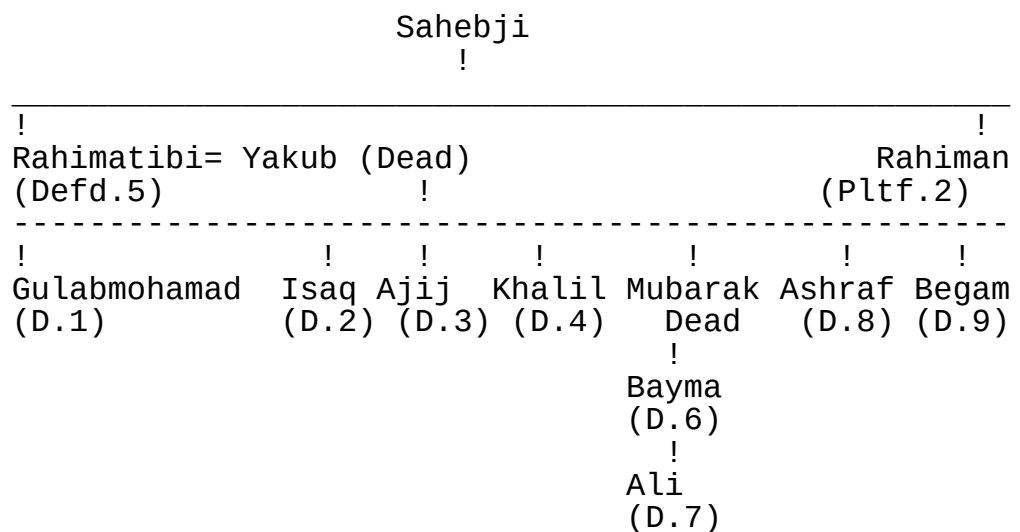
**Coram :S.R.Sathe, J.
Dated :19th September, 2007**

P.C.

1. By consent heard finally at admission stage.
2. Heard both the learned advocates.
3. Perused the papers.
4. Appellants, the original defendants in Regular Civil Suit No.82 of 1980 have preferred this appeal against the judgment and order passed by the Court of the 2nd Addl. District Judge, Sangli, whereby the order passed by the Joint CJJD, Tasgaon, dismissing the plaintiff's suit for partition and separate possession was set aside and appeal was allowed and it was held that the plaintiffs are

entitled for partition and separate possession of 2/3rd share and it be given to the heirs of the plaintiff No.3. For the sake of convenience, hereafter the parties shall be referred to as plaintiffs and defendants.

5. In order to appreciate the facts of the case it would be worthwhile to reproduce the genealogy set out in the plaint which would show the relation between the parties.



It is the plaintiff's case that the suit property bearing revision Survey No.115/1 situated at Village Tasgaon was initially owned by Sahebji, the father of the plaintiffs 1 and 2 and their brother Yakub. After Sahebji's death Plaintiffs and Yakub became

the owners of the suit property and started cultivating the same. As Yakub was the eldest son, his name was entered in the Record of Rights and subsequently he dealt with the said property for and on behalf of the joint family. Though the plaintiffs were residing at different places, they were getting income out of the suit property. Yakub died sometime in the year 1970. Thereafter plaintiffs started cultivating the suit land as per their convenience. However, the defendants started obstructing. Hence, the plaintiffs filed the present suit for partition and separate possession.

6. Plaintiff No.3, Babu Dhondi Hazare came to be joined as plaintiff as he purchased 2/3rd share out of the suit land from the original plaintiff namely Bapu Sahebjji and Raheman. The plaintiff No.2 Raheman died during the pendency of the suit and his legal heirs were brought on record as plaintiffs 2(a) to 2(f).

7. The defendants 1 to 5 filed their written statement at Exhibit 19 and admitted their relationship with plaintiffs. However, they contended that suit property was not owned by

Sahebji and it was the property exclusively owned by Yakub and plaintiffs had no right, title and interest in the same. In fact, Yakub had inducted tenant in the suit land and recovered rent from the said tenant. Thus, according to defendants there was no question of grant of any share in the suit property to plaintiffs.

8. Alternatively, the defendants contended that even if it is found that the property was initially owned by Sahebji, still for a period of about 75 years Yakub and after his death, his heirs cultivated the suit land continuously, openly and by denying the plaintiffs title and thus they have become the owners by adverse possession. The defendants also contended that partition of the suit land cannot take place because of the provisions of the Prevention of Fragmentation and Consolidation of Holdings Act. Hence, on all these grounds, they prayed for dismissal of the suit.

9. On the above pleadings, the trial court framed issues at Exhibit 38. On behalf of the plaintiff Bapu Sahebji was examined at Exhibit 79 and Dattu Hazare at Exhibit 85. On behalf of

defendants, son of Yakub, namely Khalil was examined at Exhibit 87. Both the parties produced certain documents.

10. After considering the evidence adduced by both the parties, the learned trial judge came to the conclusion that the plaintiffs have failed to prove that the suit property was initially owned by Sahebji and after his death it was jointly owned by the plaintiff and Yakub. He, therefore, dismissed the plaintiffs suit.

11. Being aggrieved by the said order, the plaintiffs filed the Civil Appeal No.96 of 1991. After hearing the arguments advanced by both the sides, the first appellate court came to the conclusion that the suit property was jointly owned by Plaintiffs and Yakub and separate possession. He, therefore, decreed the suit in plaintiffs favour.

12. The above mentioned order is challenged in the present Second Appeal. In this appeal before me, Shri Mankapure, the learned Advocate for the plaintiffs submitted that parties to the suit are

Mohammedan and as per the provisions of Mohammedan law, it cannot be said that there was joint family of Yakub and his brothers and that Yakub was acting as Manager. Besides this, he also canvassed before me that in the instant case the original plaintiffs have expired and their heirs have not been brought on record and as such the appeal is in fact abated. So, decree in favour of Plaintiff Hazare who has stepped into the shoes of plaintiffs 1 and 2 cannot be passed. As against this Shri Bodake, learned advocate for the respondents 2(a) to 2(c) and Shri Page learned Advocate for the respondents 3(a) to 3(e) submitted that from the material on record it is clear that the property in question was joint property of plaintiffs 1 and 2 and their brother Yakub. Moreover, the heirs of the plaintiff No.2 Raheman have been brought on record even during the pendency of the suit. So the question of abatement of appeal, so far as plaintiff No.2 is concerned, does not arise. Besides this, the learned advocate for the defendants submitted that the suit is for partition. Even if the heirs of plaintiff No.1 Bapu are not on record, it would not make any difference. As the heirs of original plaintiff No.2 as well as plaintiff No.3 are parties to the present second

appeal. It was therefore submitted that the appeal be dismissed.

13. It is the case of the plaintiffs that the suit property was initially owned by the father of plaintiffs and after his death it was entered in the name of Yakub, who was the elder brother of plaintiffs. It was tried to be contended on behalf of the defendants that the property was not initially owned by the father of the plaintiffs. However, the First Appellate Court, after perusing the entire evidence have recorded the finding of fact that the suit property was jointly owned by Plaintiffs and their brother Yakub. For that purpose the learned Additional District Judge placed reliance on the Mortgage Deed dated 19.3.1936 alleged to have been executed by the plaintiff and their brother Yakub. It is true that the Original Mortgage Deed cannot be produced by the Plaintiffs, but they had given the notice to Yakub's heirs for producing the same and as they failed, secondary evidence was adduced. From the Mortgage Deed it is evident that the property was jointly owned by Yakub and his brothers i.e. the Plaintiffs. Merely because there is no aspect of Joint Family amongst

the Mohammedans, it cannot be said that the finding recorded by the learned trial Judge that the Plaintiff and Yakub were each having 1/3rd share in the suit land is incorrect. From the material on record, it was atleast clear that the said three brothers were the joint owners of the suit property. So, in the absence of any other specific evidence with regard to the share of each brother in the said property on the preponderance of probabilities, the court rightly held that each brother is having 1/3rd share.

14. Admittedly, Hazare purchased the property of Plaintiff's share and was also put in possession. So it cannot be said that Hazare did not acquire any title to the suit property.

15. Shri Mankapure, learned Advocate for the Appellant strenuously argued before me that in the instant case, the trial Court had dismissed the Plaintiffs suit and in the First Appeal the heirs of Plaintiff No.1 were not brought on record and as such the appeal was abated. So, according to him, in the circumstances if the present appeal is dismissed and the decree passed by the Additional

District Judge is confirmed, there would be two conflicting decrees and hence it be held that as a result of the death of Appellant No.1 the entire appeal is abated. While considering this point it is to be noted that initially the suit was filed by two brothers namely Bapu and Raheman against the third brother for partition and separate possession. However, from the title deed of the appeal memo it is very clear that the heirs of the Appellant No.2 Raheman have been brought on record, so also the heirs of Defendant No.2 were also brought on record. The suit which was filed was for partition and separate possession. In such type of suit the share of each party is to be determined. It is needless to say that as per the provisions of Order XLI Rule 4 of CPC, where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all plaintiffs or all the defendants, any one of the plaintiffs or defendants may appeal from the whole decree and thereupon the Appellate Court may reverse or vary the decree in favour of all the Plaintiffs or defendants, as the case may be. So, in the instant case, even if the heirs of one of the Plaintiffs or rather one of the Appellants have not

been brought on record, that would not make any difference. So, considering the nature of the suit and the parties which ultimately preferred the appeal, the learned Additional District Judge was justified in decreeing the plaintiffs suit. The Order passed by the learned Trial Judge is legal and correct. There is no need to interfere with the same. Hence, I pass the following order:

ORDER

. The appeal is dismissed .

. Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R.Sathe, J.)